From: J. Scott Kasten
To: Microsoft ATR
Date: 1/26/02 8:11pm
Subject: Microsoft Settlement

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TO:

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FROM:

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To the Honorable Court:

As a citizen of the United States and 15 year veteran of the high-tech industry it is both my right, and duty to file comments with the court in the case of U.S. vs Microsoft anti-trust action as described under the provisions of the Tunney Act. I have chosen to write the court because activities of the Microsoft Monopoly have so seriously harmed my industry, that not only have they harmed the end consumer, but they have seriously impaired my ability to work in this industry.

I will begin with a brief summary of my main points before expounding upon them in greater detail with specific facts. Basically, the proposed settlement is unacceptable when viewed in the interest of the public and industry for the following reasons:

[1] The settlement was not written with a proper perspective of the industry as a whole in mind.

[2] The way the settlement is written, it only provides remedy in regards to the current Microsoft platform. Microsoft is already putting their exit strategy to a new platform in place which will have the effect of making the settlement obsolete before it even goes into effect.

[3] There are language inaccuracies that leave the efficacy of the settlement in doubt.

[4] The settlement has very few provisions to remedy Microsoft's most publicly damaging weapon which is their End User License Agreement (hereafter known as the EULA).

Now I will explore each item in greater depth so the court can better understand what actions need to be taken to fix the proposed remedy.

[1] I will start with a brief industry perspective since that forms the root of objections 2 through 4.

In the industry, it has been recognized that operating systems in general have moved from the status of a high-end, high-value product offering to a mere commodity in the same fashion as the use of electricity or telephones did in the early part of the 20th century, or even the computer hardware itself in the latter part of the 20th century. There has not been anything truly new or totally innovative in operating system technology in about the last 15 years or so. Indeed, modern operating systems are based on ideas spawned in universities over 30 years ago, most of which was perfected at least 20 years ago.

Most operating system vendors in the industry have already recognized this and adapted their business models to account for that. Although one would think of IBM, Sun Microsystems, HP, and Silicon

Graphics Inc. (now known simply as SGI), as operating system vendors, that view would be somewhat incorrect. Their business models evolved to become hardware and consulting/service vendors that sell packages. Each workstation purchased from SGI comes with an entitlement to run certain releases of SGI's IRIX operating system based on its serial number; operating system upgrades are a rather miniscule portion of their revenue stream. They are even offering a Free operating system (Linux) on some of their offerings. Sun Microsystems gives their operating system away free of charge for personal or non-commercial use, and even makes the source code available without charge to developers that need to inspect it to improve their software offerings that run on Solaris. Both HP and IBM, most notably IBM as of late, have been making steps to move away from their proprietary operating system offerings to Open Source alternatives such as Linux and various flavors of BSD; both companies have moved to the sale of hardware or software applications and consulting services maintain the cash volume of their revenue streams. And of course, with the decline in market value of proprietary operating systems, we have seen the rise in interest and importance of Open Source, or Free operating systems such as Linux, and BSD to take the place of the proprietary ones.

Companies that have failed to recognize this have perished. Witness the dismantling of Digital Equipment Corporation by Compaq, a commodity equipment and services vendor, The acquisition of Santa Cruz Operation (SCO Unix) by Caldera, a company that is known as a Linux specialist. Novell nearly perished trying to maintain their business model around Netware, but finally appears to have turned things around when they refocused on applications and services the past couple of years.

The real focus in the computer industry is not on operating systems or platforms so much as it is in cross-platform applications, hardware support, and user interfacing. Basically, John Doe with a new digital camera wants to snap some pictures, retouch them on the computer, and make some nice glossy prints for the relatives. He doesn't even want to know anything about the operating system his computer runs, he wants the camera to function with his IBM PC running a PC operating system as well as it does with his friend's Macintosh running MacOS.

In the history of this industry, Microsoft is truly unique. They have maintained and increased their market share and position not through real product innovation, but through predatory practices that resulted in them becoming a monopoly. The maintenance of that monopoly is what has allowed them to keep an artificial floor on the value of the operating system products they offer. Notice the use of the term value here instead of price. Price is what a consumer pays, value is a reflection of the consumer's need. Naturally, the need affects the price one is willing to pay, so there is an interrelationship at work that implies the consumer is paying too much, which I'll explore further in item 4.

[2] Although Microsoft has managed to keep an artificial floor on the value of their operating system products through monopolistic practices, even they realized that the inevitable pressures to marginalize the operating system would become too great for even them to bear. Thus they planned its obsolescence. The new target development platform of choice is going to be the .NET infrastructure. Ancient PC's had a BIOS containing the BASIC programming language/operating system that was permanently embedded in their ROM memory. As full fledged disk based operating systems came about, they marginalized the BIOS. None of the BIOS products these days has a built in programming language. It's only roll is to pull the disk based operating system in off disk now. It has no real apparent value to the end user of the system that rarely even notices the brief BIOS messages that flash by as the system boots up. No one programs to that interface anymore. Microsoft is trying to do the same thing to their own Windows operating system and replace it with .NET. Windows will become little more than a fancy video display

driver. No one will program to it anymore. The .NET infrastructure will be the actual target for most future software development.

This is also where I begin to find specific faults in the settlement as written. In section III. Prohibited Conduct, please reference paragraph D. The terse form of which basically says, "Microsoft must publish in full their programming APIs for the Windows operating system." The .NET framework is not specifically mentioned anywhere in the document, but presumably fits in under the definition of "Middleware" as described in sections VI. - J and VI. - K. There is no section or language which indicates that they must fully disclose the middleware APIs. This is a fatal flaw as Microsoft has publicly acknowledged the corporate strategy shift from software publication on the Windows operating system to the .NET infrastructure running on top of it. Thus they can repeat the vendor lockout cycle again on a "whole new" platform, unhindered by the terms of this settlement.

Further, section III.-J, paragraphs 1 and 2 cause me grave concern, particularly in light of the .NET strategy. Section J in summary provides government granted exclusions. Paragraph 1 basically states that Microsoft may keep any programming APIs, methodologies, and information about network protocol layers that relate to anti-virus protection, authentication, or encryption secret. Paragraph 2 allows Microsoft carte blanch to determine to whom they wish to share that information for purposes of interfacing.
This goes against what is generally accepted as "best practices" in the industry.

It is accepted practice that network protocols and interfacing standards are proposed and peer reviewed in standards committees such as the Internet Engineering Task Force (IETF) or the World Wide Web Consortium (W3C) to provide for better design, functionality, robustness, and security. Items related to authentication, and encryption in particular need the critical attention of peer review due both to the complexity of such systems, and the importance of the data protected by such systems. It is also accepted practice that the architecture is open so that anyone may produce their own implementation of the standard so that products from different vendors can interoperate freely. After all, that is the end goal, to connect one user with another.

Microsoft has in the past proven their incompetence in the implementation of cryptographic systems and security in general. Witness the introduction of L0pht Crack (pronounced "loft") which could pull encrypted passwords from the Windows NT registry thanks to its flawed cryptographic implementation. The numerous viruses such as Sircam, Love Letter, Nimbda, etc. that have exploited weaknesses in Microsoft's security interfaces. My point here is not to bring new evidence to the court, but more to make the point that sensitive systems related to security, authentication, and encryption need to be designed under the intelligence of multiple parties. Hence the peer review and refereeing process that is so widely used in the industry. It also helps prevent one party from subverting the standards for their own ends.

Micrsoft intends for the .NET platform to help provide a new infrastructure for information storage, security, and identification/authentication, that will help drive a future Internet based economy. With the help of standards committees, implementations from multiple vendors, and so forth, this could be a good thing for society. However, it is far from the public's best interest for one company to own the whole thing. If there's only one implementation, then any security flaws discovered, and experience shows there will be many, can bring down everything. Furthermore, independent companies need to have access to interfacing standards for something as important as this to provide consumers choice in the products and services space connected with this platform.

[3] I have already voiced some concern over where .NET fits into the settlement agreement. However, there are other specific inaccuracies in language and specificity that could render the agreement unenforceable.

In this matter, I would like to refer the court to a very thorough analysis compiled by one Dan Kegel and other parties available on the web here:

http://www.kegel.com/remedy/remedy2.html

Mr. Kegel has also submitted, or is in the process of submitting, this document to the court for inspection as part of an open letter with many co-signers as his contribution under the Tunney Act. I will not waste the court's time re-iterating what he has already so carefully documented except to state that I AGREE IN FULL with the assessment provided in that document.

[4] Towards the end, of the document, Mr. Kegel begins to address some issues regarding the EULA agreements that Microsoft imposes on their product users. The settlement makes no requirements for change to potentially predatory practices in Microsoft's EULAs. Unfortunately, that is one of Miscrosoft's tools for manipulating and harming the consumer, and other parts of the industry.

Mr. Kegel points out that the Windows Media Encoder EULA prohibits distribution of certain redistributable components when accompanied with application components that were licensed under a Free or Open Source license. And that the Microsoft Platform SDK and Visual C++ development environment have in their EULA a clause that can make it illegal for you to distribute and run your own created application on a Windows compatible platform such as a Windows emulator on a Sun, SGI, or Macintosh computer, or a PC running Wine, IBM OS/2, or Trumpet Petros, all of which are Windows alternatives. He also points out that some Microsoft utilities such as NewsAlert state in the EULA that they are forbidden to be run on non-Microsoft operating systems.

To those examples, I wish to add a few more.

Microsoft uses the EULA to tie their Windows operating system to the PC on which it was purchased. This means that when a user trashes a PC, he cannot use the same copy of Windows on the new PC, but must instead purchase a new and redundant copy of Windows to be fully in compliance with the licensing agreement. As PC technology dates quickly, users who must update frequently are legally bound to purchase redundant copies of an operating system that they already have, thus helping Microsoft to maintain its revenue stream on what should have already been a commodity item. In the present, Microsoft with the advent of Windows XP has already implemented software EULA enforcement that prevents users from upgrading too many components of their system before they have to go back to Microsoft and re-license the same operating system install on the same PC.

Indeed, Microsoft used to offer a refund for unwanted copies of their Windows software product with this language in the EULA, "If you do not agree to the terms of this EULA, PC manufacturer and Microsoft are unwilling to license the software product to you. In such an event ... you should promptly contact PC manufacturer for instructions on a return of the unused product(s) for a refund. " However, after an unsuccessful campaign on by many users to claim such refunds on an organized "Windows Refund Day" on Feb 15th, 1999, people discovered that Microsoft and its vendors had no intentions of honoring that clause and had no effective refund channel in place., and it appears to have since been removed from the licensing agreement.

Microsoft attempts to limit the constitutionally provided right to free speech in the EULA contained with the Microsoft FrontPage 2002 product for web publishing. It sates, "You may not use the Software in

connection with any site that disparages Microsoft, MSN, MSNBC, Expedia, or their products or services, infringe any intellectual property or other rights of these parties, violate any state, federal or international law, or promote racism, hatred or pornography." So if I publish an article on the web using MS FrontPage such as a product performance benchmark that Microsoft finds unfavorable, have I indeed violated the EULA?

Whether or not these agreements are actually enforceable if a matter of legal opinion that I am not qualified to evaluate. However, what is clear is that Microsoft has cleverly left itself some channels through which it can attempt to tie individuals or businesses up in court when it finds their actions displeasurable. The potential legal costs alone have a chilling an dampening effect in the industry.

In closing, I beg the court to find the proposed settlement as lacking in enforceability and effective remedy. This settlement needs to be rejected and reworked keeping the points that I have outlined above in mind. Thank you for your time and consideration in this matter.

Sincerely,

Jonathan Scott Kasten